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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO AVILA,

Defendant and Appellant.

B213327

(Los Angeles County
Super. Ct. No. TA094492)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry E. Johnson, Judge. Affirmed with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was charged by information with ten counts of residential robbery under Penal Code Sections 211 and 213, subdivision (a)(1)(A)¹ and with the special allegations under 12022 subdivision (a)(1) (principal armed with a firearm in the commission of the robbery) for each count. As to two of the robbery counts, he was also charged with special allegations under section 12022, subdivision (b)(1) (use of a dangerous weapon, a knife). At the end of the second trial (the first trial resulted in the dismissal of five counts of robbery and the knife use allegations by the trial court under 1118 and a mistrial following a hung jury), the jury found the appellant guilty of four counts of robbery, found true the special allegations of principal armed with a hand gun and acquitted him on the remaining robbery count. The trial court at sentencing imposed the middle term of six years plus three consecutive terms of six years (one-third of the middle term of six years) for each of the remaining robbery counts for a total sentence of twelve years. In addition to the prison term, the appellant was ordered to pay a \$200 restitution fine (§ 1202.45), an \$80 in-court security fee (§ 1465, subd. (a)(1), plus a \$20 DNA fee (Gov. Code, § 76104.7). The appellant contends on appeal that the \$20 DNA fee under Government Code section 76104.7 was improper. Respondent agrees with appellant and further concedes that the fee should be stricken. We will strike the \$20 DNA penalty assessment and in all other respects affirm the judgment.

STATEMENT OF FACTS

During the evening of December 11, 2008, members of the Arriaza family were at home when they were confronted by an armed woman and two men, who entered their house, ordered them to the floor, struck and beat them, threatened further harm to them or their children, taped their hands and eyes, and stole a number of items of value along with more than \$12,000 in cash. The family's teenage daughter, Iliana, and her next-door-neighbor friend, Brenda Correa, were in a bedroom watching television when they looked out and saw the robbery in progress. Brenda tried to barricade the door to prevent anyone

¹ All statutory references are to the Penal Code unless otherwise specified.

from entering, while Iliana telephoned her brother who lived nearby. When Iliana's brother arrived, he too was forced to the floor at gunpoint. Brenda also called the police, and her mother.

Appellant Armando Avila was known to the Arriaza family, both as a coworker with their next-door neighbor, Maria Correa, and as a long-time friend and a frequent visitor to the Correa home. He had also had some recent financial dealings with Mr. Arriaza.

According to appellant, he and Mr. Correa were chatting in the driveway when they learned of the robbery in progress from Brenda's mother, who had just received Brenda's call. When they ran down the driveway to the Arriaza's house to aid Brenda, the robbers were gone, but the victims remained bound on the livingroom floor. Appellant tried – unsuccessfully – to persuade Brenda that he was there to help, and to open the bedroom door. Brenda's testimony, on the other hand, was that appellant tried to force his way into the bedroom during the robbery, apparently in aid of the robbers.

Appellant left the scene before the police arrived, later claiming that he feared he would be arrested for two outstanding traffic violations. He was arrested a few days later. The items taken during the robbery were not found.

It was the prosecution's theory that appellant was a lookout and active participant in the robbery. He was charged by information with ten counts of residential robbery under Penal Code sections 211 and 213, subdivision (a)(1)(A), and as to all ten counts he was charged with special allegations under Penal Code section 12022, subdivision (a)(1) (principal armed with firearm in the commission of a robbery). As to two counts he was also charged with special allegations under Penal Code section 12022, subdivision (b)(1) (use of dangerous weapon, a knife).²

In appellant's first trial, upon the close of the prosecution's case the trial court dismissed five of the ten counts pursuant to section 1118 (including those alleging appellant's use of a knife), finding that the evidence was insufficient to sustain a verdict

² All statutory references are to the Penal Code unless otherwise specified.

as to those charges. It entered a mistrial when the jury was unable to reach a verdict as to the remaining five counts.

In the second trial, the jury acquitted appellant of one of the remaining five counts, (count 3). However, it found him guilty of four counts of home invasion robbery, acting in concert with others (counts 1, 2, 4 and 8), and it found that a principal in the commission of the crimes was armed with a handgun. (§§ 211; 213, subd. (a)(1)(A); 12022, subd. (a)(1).)

In sentencing appellant, the trial court denied probation, designated count one as the principal term, and imposed the middle term of six years for that count. For each of the remaining three counts the court imposed consecutive terms of two years (one-third of the middle term of six years), for a total sentence of 12 years. In mitigation, the court considered the fact that that appellant had no record of criminal activity. However, it found that mitigating factor to be outweighed by factors in aggravation, including the violence of the crime, the fact that weapons were involved, and the resulting injuries.³ The court ordered appellant to pay a \$200 restitution fine (§ 1202.4, subd. (b)); it imposed, and stayed, a \$200 parole-violation fine (§ 1202.45); and it ordered appellant to pay \$80 in court security fees (§ 1465.8, subd. (a)(1)), and a \$20 DNA fee (Gov. Code, § 76104.7). The appeal was timely filed.

Discussion

The radically conflicting factual scenarios that were advanced by the prosecution and appellant to support appellant's guilt and innocence were each supported by testimony and other evidence. The jury apparently accepted the prosecution's theory that appellant was present during the robbery, and that he was there to aid the robbers rather than the victims. While appellant's evidence shows otherwise, on appeal he does not

³ The prosecution did not seek the additional one-year enhancement for a person who is armed in the commission of a felony (§12022, subd. (a)(1)), and the jury was not instructed to make that finding.

contend that the evidence was insufficient to support the prosecution's theory, and he identifies no errors during trial that he contends resulted in the verdicts against him.

Appellant's only contention on appeal is that the trial court's DNA penalty assessment under Government Code section 76104.7 is not authorized by law, because the court imposed no fines, fees, or forfeitures to which the penalty assessment could attach. Respondent properly concedes the impropriety of that penalty assessment, and that it should be stricken.⁴

Because the DNA fee does not apply to the restitution fine or court security fee imposed here (Gov. Code, §§ 76104.6, subd. (a)(3), 76104.7, subd. (c); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396), and there was no other fine, penalty or forfeiture on which the DNA assessment could be made, the \$20 DNA penalty assessment must be stricken.

DISPOSITION

The \$20 DNA penalty assessment is stricken. The clerk of the superior court shall prepare an amended abstract of judgment reflecting this change in appellant's sentence. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

⁴ Respondent mistakenly identifies appellant's challenge as contending that two DNA fees were improperly imposed, under both sections 76104.6 and 76104.7. However, the trial court imposed only the DNA fee under section 76104.7.